

## **EXHIBIT 5**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

EPLUS, INC.,

Plaintiff,

v.

Civil Action No.  
3:09CV00620

LAWSON SOFTWARE, INC.,

Defendant.

Before: THE HONORABLE ROBERT E. PAYNE, JUDGE  
HEARING ON EPLUS' MOTION TO STRIKE

May 24, 2010

Richmond, Virginia

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1 were to do. You were to respond to what they said.  
2 It is your obligation to say the Markman hearing  
3 changed again, here's where it changed, here's what  
4 we -- here's where in the Shamos report he addresses  
5 that, and that's it.

6 What you want to do is this. You want to  
7 use the expert's report in the way that the Federal  
8 Rules were changed to stop the Federal Rules from  
9 being used as games because that's the way people used  
10 to play the game. They used to say, oh, well, now  
11 we'll use the federal -- the expert's report as a  
12 vehicle to bring into the case things that aren't  
13 appropriate, and you all want to -- you do the same  
14 kind of thing, and I just -- I'm worn thin with it  
15 all.

16 MR. MCDONALD: Well, it wasn't our intent  
17 to --

18 THE COURT: So you didn't tell me but two  
19 ways in which the Markman hearing -- Markman ruling  
20 changed the rules, and I understand the law on that  
21 and that's -- it's correct that if the Markman hearing  
22 changes the rules and you can show that it changes the  
23 rules, then you're entitled to have some comment on  
24 it. But you did that. In your brief, you pointed out  
25 two things, and I want you to now show me the part of

1 THE COURT: I've had enough of this.

2 MR. MCDONALD: I can appreciate that.

3 It's --

4 THE COURT: It is the -- this is the game  
5 of hide the pea, and it changes every time that  
6 something happens.

7 Now, I do understand the basic principle  
8 of law that if the Markman hearing necessitates some  
9 other comments from an expert, then perhaps that ought  
10 to be allowed, but I first need to -- the predicate  
11 for that is, A, what part of the Markman hearing does  
12 that, and B, what part of the report then responds to  
13 the Markman hearing. And I have not -- I've gotten  
14 you to tell me what part of the Markman hearing does  
15 it, and I've got that language. Now I'm looking for  
16 B. Where is the part that addresses -- of this man's  
17 report that addresses it?

18 Now -- that language, and that language is  
19 "means for building a requisition using data relating  
20 to selected matching items and their associated  
21 sources." And I don't have a page -- it's not in  
22 his -- the textual 76 pages of his report you tell me,  
23 so I've got to go look at a chart. I can look at a  
24 chart and I have no way through it except for the  
25 number of red tabs I'm working on. I can't -- it's --

1 Lawson for a deposition about its prior art systems,  
2 and then when they saw that the Lawson prior art was  
3 not in our supplemental invalidity contentions, they  
4 said, oh, well, do we not need that deposition  
5 anymore? And we said, well, no, we want to make it  
6 perfectly clear that the Lawson prior systems are  
7 relevant for reasons other than invalidity, so you  
8 better make sure you take that deposition so you can  
9 get that background information.

10 THE COURT: Yes, but that's not what's  
11 before me today.

12 MR. MCDONALD: Well, and if that's clear,  
13 then that's fine. As I understand it, the issue is  
14 whether we're going to stop Dr. Shamos from talking  
15 about the Lawson system as a prior art system and give  
16 opinions on invalidity.

17 THE COURT: Yeah.

18 MR. MCDONALD: And that's a totally  
19 different issue from whether or not the Lawson systems  
20 that preexisted the hypothetical negotiation would be  
21 at issue.

22 THE COURT: I'm not ruling on that. It  
23 may very well be that you can't get it in, but I'm not  
24 ruling on it today except that it cannot come in  
25 through Dr. Shamos because he didn't, by his own

1 it at trial. But I think they have made a showing  
2 sufficient that CellPro ought to operate there to  
3 allow the discovery to be taken and the opinion to  
4 remain at this time.

5 The other I don't have any basis for  
6 making a comment on, for making a ruling on, so I am  
7 not going to be able to -- to rule. I believe that  
8 the party arguing the application of CellPro has the  
9 burden to demonstrate how the claim construction  
10 opinion necessitates listing additional prior art  
11 opinions and references, and that hasn't been carried  
12 here as to the second -- that is the -- the second  
13 reference; that is on the one on page 6, and so that  
14 can't be allowed, which basically means that to the  
15 extent that version 5 -- Lawson version 5 and 6 are  
16 dealt with in the opinion offered by Shamos in  
17 response to the claim construction opinion section  
18 that says "means for searching for matching items in  
19 the database" can be considered further, subject to  
20 revisitation at trial.

21 The others I have -- I believe Lawson has  
22 not covered that basis -- covered its burden. And  
23 version 6 and version 5 were in their initial list.  
24 They were going to pare it down. They dropped it, and  
25 then the addition of it keeps it out to -- and only --